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Supreme Court, U.S.
FILED

02 1356 JAN 13 2003

Docket No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2002

IN THE MATTER OF
LAWERNCE D. KENEMORE JR.
PETITIONER

V

UNITED STATES OF AMERICA
RESPONDENT

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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92 PP

QUESTIONS PRESENTED

If 18 U.S.C. 1341 essential element, is materiality pursuant to this courts decision in Neder v. United States 527 U.S. 1 (1999)

The first question is was the Courts below decision contrary to clearly established substantive law as determined by the Supreme Court?

The second question is does 18 U.S.C. 1341 meet the standards for vagueness inquiry and implicate the principle of federalism, after the Court's decision in Neder?

The third question is, prior to Neder 18 U.S.C. 1341 did not so much as mention materiality and thus the factual basis of the Kenemore's indictment does not charge the commission of an offense? Likewise the indictment did not place Kenemore upon notice of the element.

The fourth question is was this Court's decision in Neder an intervening decision on substantive law?

The fifth question is materiality a recurring error?

Must a Petitioner always resort to the Savings Clause of 28 U.S.C. 2255 to file a 28 U.S.C. 2241?

Does it invoke the suspension of the Writ Doctrine of Article 1 Section 9?

Does the Supreme Court need to provide guidance as to factors that must be satisfied to file a 2241 when a 2255 is

inadequate and ineffective?

Did this Court mean what it said in United States v. Cabrales 524 US- 1 (1998)

Is venue a jurisdictional element?

Three Protections not waivable
Subject Matter jurisdiction
Materiality
Cotton
Venue
When must it be decided?

Lists of Parties
Rule 14.1 Statement

The Parties to this proceeding are: Lawernce D. Kenemore Jr. and the United States of America.

TABLE OF CONTENTS **PAGE**

Questions presented i
Rule 14.1 Statement iii
Table of Contents iv
Table of Authorities viii
Opinions Below 1
Jurisdiction 1
Constitution and Statutory Provisions Involved 1
Statement of the Case 2

I

Page

Was Kenemore tried on conduct that was not a crime? . . .3

A. McNally - Neder. 4

B. Materiality element is a Recurring error. 4

C. Due Process Clause of the Fifth and Fourteenth Amendment 5

D. Fair Warning Doctrine. 6

E. Law of the Case Doctrine. 6

F. Was Court's decision below contrary to clearly substantive established Law as determined by this Court?. 7

G. Does 18 USC 1341 meet the Standards for Vagueness Inquiry and implicate the Principles of Federalism? 8

II

Must a Petitioner always resort to the Savings Clause of 28 USC 2255 to file a 28 USC 2241 Habeas Corpus? 9

A. Does it invoke the Doctrine of Suspension of the Writ of Article 1 Section 9 of the Constitution?.10

B. The Supreme Court needs to provide Guidance as to the factors that must be satisfied to file a 2241 when a 2255 is inadequate or ineffective. . 11

III

Is Venue a Jurisdictional Element 12

A. Did this Court mean what it said in United States v Cabrales 524 US 1 (1998). 12

B. Three protections not waiveable?. 13

Page

Subject Matter Jurisdiction. 14
Materiality. 14
Cotton. 14
Venue. 15
When must it be decided?. 16

CONCLUSION. 16

TABLE OF AUTHORITIES

SUPREME COURT CASES — **Page**

Neder v United States 527 US 1,25 (1999). 3,4,5,7,16
US v Cabrales 524 US l (1998). 2,12,13
Sullivan v Louisiana 508 US 275 (1993). 3
US v Gaudin 575 US 506 (1995). 3
McNally v United States 483 US 4,6
Fasulo v United States 272 US 620, 629 (1926). 5
United States v Wells 519 US 482, 488 N. 4 (1997) 6,7
Williams v Taylor 529 US 362, 412 (2002) 7
Bousley v United States 523 US 614, 620 (1998) 10
Kolender v Lawson 461 US 352, 357 (1983) 8
Smith v Goguen 415 US 506, 575 (1974) 9
Bousley v United States 118 S Ct 1604, 1610 (1998) 7
United States v Cotton 14
United States v Carll 105 US 611, 612 (1881) 15
Haynes v United States 205 US 427, 431 (1932) 15
Morrissette v United States 342 US 246, 270 (1952) 15
United States v Debrow 346 US 374, 376 (1953) 15
Russell v United States 369 US 749, 763 (1962) 15
Ruhrgas A.G. v Marathon Oil 526 US 574 (1999) 16
Cleveland v United States 531 US 12 (2002) 16

CIRCUIT CASES

US v Gee 226 F3rd 885, 891 (7th Cir 2000) 5
Henderson v Haro 282 F3rd 862, 863 (5th Cir 2002) 9
Reyes-Requena v US 243 F3rd 893, 903, 904 (5th Cir 2001) 9,11
In re: Jones 226 F3rd 328, 333-334 (4th Cir 2000) 9
Wofford v Scott 177 F3rd 1236, 1244 N.3 (11th Cir 1999) 9
US v Barrett l78 F3rd 34, 52 (1st Cir 1999) 10
Treistman v US 124 F3rd 361, 377 (2nd Cir 1997) 10,12
In re: Dorsainvil 119 E3rd 251, 252 (3rd Cir....) 10
In re: Hanserd 123 F3rd 992, 929-932 (6th Cir 1997) 10

Page

In re: Smith 285 F3rd 6 (D C Cir 2002) 11

CONSTITUTION, STATUTES, AND RULES

18 US C 1341 1,4,5,6,7,8,9,10,14
28 US C 2255 2,9,10,11
28 US C 2241 3,9
28 US C 1254 (i) 1
14th Amendment US Constitution 1,5
6th Amendment US Constitution 1,2,13,15
5th Amendment US Constitution 1,5
Article 3 Section 2 Clause 3 US Constitution 2,13,15
Article 1 Section 9 US Constitution 10

MISCELLANEOUS

Moore's Fed Rules Criminal Procedure-18 13
Writ Doctrine of Article 1 Section 9 10
Fair Warning Doctrine 4,6
Law of the Case Doctrine 6
Wright Miller Cooper Federal Practice & Procedure 6

BRIEF OF PETITIONER

OPINIONS BELOW

The Fifth Circuit Court of Appeals per curiam order is (Appendix -1). The Magistrates Report and Recommendations is (Appendix -2). The District Judge for the Eastern District of Texas Order of Dismissal and Final Judgment is (Appendix-3). Kenemore's Notice of Appeal is (Appendix- 4).

JURISDICTION

The decision sought to be, reviewed was entered by the United States Court of Appeals for the Fifth Circuit on October 16, 2002. 'This Court has Jurisdiction to review that decision under 28 U.S.C. 1254 (1).

CONSTITUTIONAL, STATUATORY PROVISIONS INVOLVED

The relevant provisions of 18 USC 1341 is (Appendix-5); the Fourteenth Amendment (Appendix-6); the Sixth Amendment (Appendix-7); the Fifth Amendment (Appendix-8); Venue (Appendix- 7,10,11)

STATUTES INVOLVED

This case is ultimately quite easy. Congress enacted 18 U. S. C. 1341(Appendix- 5), a statute imposing criminal sanctions for Mail Fraud. This statute is, at a minimum, ambiguous with respect to the essential elements, especially the essential element of materiality. Unless the statute is clear, the question of whether vagueness should be resolved for or against Kenemore can have only one answer. Due process considerations embodied in the Fifth, Sixth, and Fourteenth

Amendments point clearly to an interpretation that favors Kenemore.

Despite the attempts of the lower Courts to disregard sound teachings on Federal Rules of Criminal Procedures 18 (Appendix -11); Article 3 Clause 2 (Appendix- 10); the Sixth Amendment (Appendix- 7), and the Cabrales decision, this Court is able to give sound teaching to the lower courts.

STATEMENT OF THE CASE

Kenemore was indicted in the Northern District of Texas in a 25 Count Indictment charging mail fraud, conspiracy, money laundering, and false statement. (Appendix-9)

Prior to the start of the trial, Kenemore filed Motions objecting to subject matter jurisdiction and venue which were subsequently denied.

During trial Kenemore filed requested jury instructions with the court, specifically on materiality and venue, which were denied by the Court.

Prior to the jury retiring to deliberate, Kenemore objected to the jury charge, which was denied by the Court.

After a six week and one day trial, Kenemore was found guilty by the jury of all 25 counts.

Kenemore was sentenced to 235 months incarceration.

Kenemore filed a direct appeal, which was denied by the Fifth Circuit without comment, on any issue.

Kenemore filed a 2255 on the single issue of denial of counsel which was denied by the District Court and the Fifth

Circuit.

Kenemore in 2000 began research on the Venue and Materiality issues and found this Courts substantive law rulings and filed his 2241 in the Eastern District of Texas where he was incarcerated.

The Magistrate's Order and Recommendation Attached (Appendix-2) was affirmed by the District Judge. (Appendix-3)

Kenemore appealed to the Fifth Circuit, which issued it's per Curiam Order, attached as (Appendix-1) on October 16, 2002.

WAS KENEMORE TRIED ON CONDUCT THAT WAS NOT A CRIME?

It is undisputed that Kenemore' s Grand Jury failed to find the essential element of materiality.

In the same vein, the indictment does not establish that any material misrepresentations were made by the Grand Jury, and of course it was not required at the time.

Applying these fundamental principles in conjunction with Neder, Kenemore could not have been tried for mail fraud.

Here the Fifth Circuit shifts the blame to Kenemore for not including materiality argument in his 2255 (Appendix-1 Page 2) and sub silentio concluded that Kenemore' s Neder argument was for naught. Such burden shifting has been rejected by this Court in both Sullivan v Louisiana 508 US 275 (1993) and United States v Gaudin 575 US 506 (1995).

It blinks at reality to think even for a moment that the materiality essential element was not a decisive Grand Jury issue.

(A)

McNALLY-NEDER

It should not fall on deaf ears with this Court that in 1987 this Court decided McNally v United States 483 US 350 (1987) and in 1988 Congress in response passed 18 U.S.C. 1346 as an amendment to the Anti-drug abuse Act of 1988.

In 1999 this Court decided Neder v United States 507 US 1(1999) and as of this date Congress has made no attempt to amend 18 U.S.C. 1341.

This Court is therefore left where it left off with Neder, "Materiality has always been an element of the mail fraud, wire fraud and bank fraud statutes." 1341 is a statute that under the Fair Warning Doctrine did not advise all the essential elements to bring Kenemore within its purview, and so his indictment.

(B)

MATERIALITY ELEMENT IS A RECURRING ERROR.

The Fifth Circuit Court's decisions that Neder did not constitute a change in substantive law is in conflict with this Court's jurisprudence and has diluted this Court's decisional power as to substantial rights as it concerns 18 U. S. C. 1341 and the essential element of materiality, and will continue to recur in the future.

On point U. S. v Gee 226 F3d 885, 891 (7th Cir. 2000). "The Government concedes that Neder holding will be retroactively applied to this case". As in Kenemore's case, (Appendix- 9) the indictment merely alleges a scheme to defraud which Neder Court ruled insufficient.

Evidence points to the fact that there are "numerous" Neder arguments lurking in the annals of the Judiciary, and will continue to be brought to this Court as they were in the weeks prior to Kenemore' s Writ.

(C)

THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT

The Due Process Clause of the Fifth and Fourteenth Amendments require the Legislature to specify the elements of Criminal offenses. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute. Fasulo v United States 272 U 5 620, 629 (1926)

Until Neder, materiality was not an element of 18 U.S.C. 1341 and Circuit precedent created a whole cloth of Judicial interpretations that varied from Circuit to Circuit. The result was a truly extraordinary statute in which the substantive force of the statute varied in each Judicial District.

Respect for the Justice System would be subverted if this Court would refuse to reverse Kenemore's conviction, where the application of 18 U.S.C. 1341 to his conduct deprived him of Due Process of the Law.

(D)

FAIR WARNING DOCTRINE

Even if Kenemore was fully familiar with 18 U.S.C. 1341 (Appendix- 5) at the time of his indictment, and the case law, he would have lacked any comprehensible fair warning that 18 U.S.C. 1341 included materiality as an essential element. Accordingly, application by the Grand Jury of 18 U.S.C. 1341 violates the Fair Warning Doctrine, and the failure of the Congress to amend the statute, as they did after McNally v United States 483 U 5 350 (1987) and add materiality continues to violate this Doctrine.

The requirement is imposed by the Supreme Court of the Fair Warning Doctrine to speak more clearly was for the benefit of the public, the average citizen who must be forewarned and given notice that certain conduct may subject him to Federal prosecution

(E)

LAW OF THE CASE DOCTRINE

The law of the Case Doctrine goes to an Appellate Court's relationship to the Court of the Trial. See 18 C. Wright A. Miller, and E. Cooper, Federal Practice and Procedure @ 4478 (1981) United States v Wells 519 U 5 482, 488 N. 4 (1997)

The law of the case by the Government as evidenced by the. Grand Jury indictment, (Appendix -9) and jury instruction is that "materiality" is not an element of 18 U. S.C. 1341.

The Law of the case Doctrine holds the government to this position and it cannot change it's position on it's way to

the Supreme Court.

Adherence to this rule does not come without some costs. The Law of the Case Rule binds the Court's hands and restricts the Court of Appeals from fulfilling it's usual rule of Reviewing lower Courts decisions for errors of law Wells @ 925-26

(F)

WAS THE COURT'S BELOW DECISION CONTRARY TO CLEARLY ESTABLISHED LAW AS DETERMINED BY THE SUPREME COURT?

The statutory phrase " clearly established Federal Law as determined by the Supreme Court of the United States" refers to holdings as opposed to dicta of this Court's decisions Williams v Taylor 529 U 5 362. 412 (2002), Neder v United States 527 U 5 1, 25 (1999) this Court unequivocally established that materiality has always been an element of the mail fraud, wire fraud, bank fraud statute 18 U.S.C. 1341 et seq.

The Neder case on 18 U.S.C. 1341 was a change in substantive law, the statute as of today does include materiality as an element. While a new rule of Constitutional Procedure generally does not apply retroactively on collateral review, a new rule of substantive criminal law is presumptively retroactive, because a defendant may have been punished for conduct that simply was not illegal. Bousley v. United States 523 U 5 614, 620 (1998)

Certainly at the time of Kenemore' s indictment, materiality was not an element of 18 U.S.C. 1341, therefore, it would have been contrary to existing law for the government to instruct the Grand Jury on the essential element of

materiality.

This Court's Neder decision undoubtedly qualifies as "clearly established Federal Law as determined by the Supreme Court of the United States."

The set of facts in Kenemore' s case are materially indistinguishable from Neder. However the District Court and the Fifth Circuit applied the Neder substantive law in a way that contradicts the governing law of Neder.

The Fifth Circuit's decision in Kenemore's case involves an unreasonable application (not an incorrect application) of clearly established Federal Law as determined by this Court.

Absent a conclusive ruling by this Court, that Neder created a substantive rule of law, District Courts and Circuit Courts will continue to deny defendants their right to have a Grand Jury determine all the. essential elements of 18 U.S.C. 1341.

(G)

DOES 18 U.S.C. 1341 MEET THE STANDARDS FOR VAGUENESS INQUIRY AND IMPLICATE THE PRINCIPLES OF FEDERALISM?

The first inquiry that bears on vagueness- the Sufficiency Notice- is whether the statute as it is written provides notice sufficient to alert ordinary people (t)o what conduct is prohibited. Kolender v Lawson 461 U 5 352. 357 (1983).

The essential element of materiality absent from the text of 18 U.S.C. 1341 simply provides no clue to the public, or the

Courts, as to what conduct is prohibited under the statute.

The second vagueness inquiry (and the "more important" of the two) is whether [s]tatutory language [is] of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections Smith v Goguen 415 U S 506. 575 (1974). With the essential element of materiality missing this creates a standardless sweep.

If the words of a criminal statute insufficiently defines the offense, it is no part of defference to Congress for this Court to intuit or invent the crime, and this Court cannot assume the place of Congress.

The absence from 18 U.S.C. 1341 of the essential element, materiality, implicates the principles of Federalism, that is 1341 is unconstitutionally vague as applied to Kenemore.

II

MUST A PETITIONER ALWAYS RESORT TO THE SAVINGS CLAUSE OF 28 U.S.C. 2255 TO FILE A 28 U.S.C. 2241 HABEAS CORPUS

(Appendix -1 Page- 2) asserts that for Kenemore to bring a 2241 that he must meet the Savings Clause of 2255. Fifth Circuit case law is firm on this point. Henderson v. Haro 282 F3rd 862, 863 (5th Cir 2002). Citing cases.

However varying standards have been adopted by the Circuits. See Reyes-Requena v US 243 F3rd 893, 903-04 (5th Cir 2001) surveying cases. See also In re: Jones 226 F 3rd 328, 33 334 (4th Cir 2000); Wofford v. Scott 177 F3rd 1236, 1244 N-3 (11th

Cic 1999); United States v. Barrett 178 F3rd 34, 52 (1st Cir 1999); Treistman v United States 124 F3rd 361, 377 (2nd Cir 1997); In re: Dorsainvil 119 F3rd 251. 252 (3rd Cir); In re: Hanserd 123 F3rd 922, 929-932 (6th Cir 1997), all these standards have caused application of the law to be unequally applied based upon the Circuit a person lives in. The Circuits are deeply divided and require guidance.

The question that can be answered only by this Court is, must Kenemore always resort to the Savings Clause of 28 U.S.C. 2255 to file a 28 U.S.C. 2241 Habeas Corpus, and set the Standards to be applied equally by the Circuit and District Courts.

(A)

DOES IT INVOKE THE DOCTRINE OF SUSPENSION OF THE WRIT OF ARTICLE 1 SECTION 9 OF THE CONSTITUTION

If there is a Constitutional Entitlement to a reasonable procedure for correcting fundamental legal errors in criminal process, then interpreting 2255 Savings Clause narrowly as the District Court and Fifth Circuit has done, would deny Kenemore that entitlement.

Is the adequacy of 2255 so narrowly worded that a Constitutional Right to Habeas Corpus moots the needs of Practical Judicial enforcement?

The fear that an innocent person's liberty, or worse, his life, may be forfeited because of unfair proceedings , has long been recognized as one, among other, circumstances that makes issuance of the Writ most felicitous Bousley v. United

States 118 S Ct 1604, 1610 (1998).

(B)

THE SUPREME COURT NEEDS TO PROVIDE GUIDANCE AS TO THE FACTORS THAT MUST BE SATISFIED TO FILE A 2241 WHEN A 2255 IS INADEQUATE OR INEFFECTIVE

With all the varying standards outlined above, this Court can bring a fairness and continuity to the Judiciary by setting forth the necessary factors.

Here are examples:

And as subsection (2) speaks only to intervening Supreme Court cases based on Constitutional grounds, the provision does not provide any avenue through which a petitioner could rely on an intervening Court decision based on the substantive reach of a Federal Statute. Reyes- Requena v U.S. 243 F3rd 893 903 (5th Cir 2001)

(with)

Smith is actually innocent having been convicted on the basis of an incorrect understanding of 924 (c), and 2255 relief is unavailable In re Smith 285 F3rd 6 (D. C. Cir

2002)

(with)

The Second Circuit devised its Savings Clause test based on whether failure to permit a remedy would raise. serious Constitutional questions Treistman v. United States 124 F3rd 361, 377 (2nd Cir 1997).

This Court needs to provide guidance to the lower Courts to bring fairness and continuity to the Judicial System.

III

IS VENUE A JURISDICTIONAL ELEMENT?

(A)

DID THIS COURT MEAN WHAT IT SAID IN UNITED STATES V. CABRALES 524 U S 1 (1998)

The Constitution twice safeguards Kenemore's Venue Rights. (Appendix - 7 and 10), and the statute (Appendix - 11) adds to the safeguards, that is the trial of all crimes.... Shall be held in the state where said crimes shall have been committed; by an impartial jury of the State and District wherein the crime shall have been committed.

In this case there is not the slightest indication that the Fifth Circuit (Appendix -1), or the District Court (Appendix - 2) reviewed or ruled on this issue in any fashion. Nor is there any

indication that either the District Court or the Court of Appeals felt bound in any way by the Sixth Amendment, Article 3, Section - 2, Clause 3 or the Federal Rules of Criminal Procedure Rule 18.

It is of the essence of the Common-law method that Courts consider and rely on decisions from the Supreme Court.

What the Fifth Circuit and District Court cannot avoid is the simple fact, quickly and easily verifiable by computer assisted research: The locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it" Cabrales @ 6.

(B)

THREE PROTECTIONS NOT WAIVABLE

The Sixth Amendment (Appendix - 7) Article 3 Section-2, Clause -3 (Appendix -10) and Federal Rules of Criminal Procedure Rule -18 (Appendix - 11), all speak to the issue of Venue, and all protect Kenemore's rights. Even though Kenemore did not waive this issue (pre-trial motion on venue) subject matter jurisdiction is not waive able and the District Court and Fifth Circuit did not in any fashion review it.

(Appendix -9) Kenemore's Indictment shows Count - 2 Page 14, paragraph # 3 (b), page -15 paragraph #4 (1) (2) (3) (4) (5), Count-16, 17, 18 all took place in California and had no connection with the Northern District of Texas.

If the Court meant what it said in Cabrales then this Court should take the Fifth Circuit to task for not adhering to its case law.

IV

SUBJECT MATTER JURISDICTION

MATERIALITY - VENUE

(A)

MATERIALITY

It cannot be gainsaid that the Indictment to which Kenemore went to trial on and was convicted after numerous objections, alleged mail fraud of the very form held in Neder not to constitute an offense under 18 U.S.C. 1341.

That is the Indictment alleges a specific course of conduct that was outside of the reach of the mail fraud statute. Kenemore's innocence of the charged offense appears from the very allegations made in the indictment, not from the omission.

When a Court without Jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force.

COTTON

This Court in it's Cotton decision did not address whether the sufficiency of an indictment assumes a jurisdictional dimension, when the only facts it alleges, and on which a subsequent finding of guilt is based, describes conduct that is not proscribed by the charging statute.

Unlike Cotton, Kenemore is not raising an omission from his indictment of a fact that goes to sentencing, his challenge is to the subject matter jurisdiction of the Trial Court.

Kenemore has raised Subject Matter Jurisdiction of the Court from pre-trial to this writ, and no Court has made a Judicial Finding.

(B)

VENUE

Subject Matter Jurisdiction is also invoked when an Indictment fails to allege Venue, for without venue the Court lacks Subject Matter Jurisdiction.

Surely Venue is an essential element as this Court stated in Cabrales. As such, it invokes subject matter jurisdiction of the District Court. Venue is a matter of substance and not form and the missing element cannot be inferred from other allegations of the Indictment.

Throughout the years of this Courts jurisprudence there has been one unchanging common requirement; in cases directly facing this issue, is the necessity for the indictment to charge essential elements of the offense to give the Court subject matter jurisdiction? United States v. Carll 105 US 611, 612 (1881) Hagner v. United States 205 US 427, 431 (1932) Morrissette v. United States 342 US 246-270 (1952) United States v. Debrow 346 US 374, 376 (1953) Russell v. United States 369 US 749, 763 (1962) The answer has always been yes! Especially as here the implication of the 6th Amendment, Article 3 Section 2 Clause 3 which have major Constitutional reasons why the Court lacked subject matter jurisdiction, that is Venue was not set in that Court.

(C)

WHEN DECIDED

Subject matter jurisdiction can be raised at anytime, Ruhrgas A.G. v. Marathon Oil 526 US 574 (1999) and must be policed by the Courts on their own initiative, even at the highest level

Simply put, Kenemore raised it in the District Court and the District Court did not address it (Appendix 2 and 3), and he raised it in his Appeal Brief, and the Circuit Court did not address it (Appendix 1).

When will someone ever rule on Subject Matter Jurisdiction? This is the Court of the last resort.

CONCLUSION

THE ISSUES PRESENTED ARE RECURRING

AND OF GREAT PRACTICAL IMPORTANCE

Resolving the issues raised by Kenemore that has divided the Courts, would give this Court the opportunity to provide uniformity in the aspect of Due Process of the 5th and 14th Amendments.

This Court will be able to clarify it's Ruling in Neder v. United States and Cleveland v. United States 531 US 12 (2000) by ruling for Kenemore that these cases are substantive law rulings that establish his conduct as set forth in the Indictment is not a crime.

The decisions since Neder, meander over the Judicial landscape to dodge the necessity to answer the question well settled in Neder, A single authoritative, strongly worded decision here would end all of this assembly line decision making.

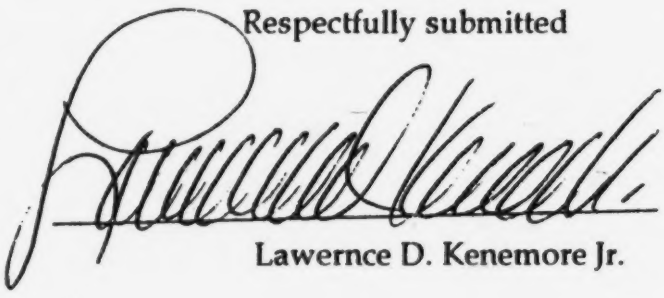
Furthermore, the subject matter jurisdiction Doctrine is in jeopardy of being eroded by the District Court and the Circuit Court's failure to address it when raised.

And the use of the Procedural Default Rule by the Fifth Circuit in Kenemore' s case (Appendix -1) deprives Kenemore and others the right to be heard when this Court makes decisions that establish that the conduct in the Indictment is not a crime, and that he is actually innocent.

Kenemore now asks this Court to take to task the lower Courts for failing to address Venue, a Venue that this Court (which Kenemore cited) stated is necessary for money laundering. Missing from (Appendix -1) and (Appendix -3) is any discernable Judicial decision on venue.

For these reasons, this Writ should issue.

Respectfully submitted



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